Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of	)	
	)	
Administration of the North American Numbering Plan	)	CC Docket No. 99-200
	)	

PETITION FOR CLARIFICATION OF PAC-WEST TELECOMM, INC.

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Executive Summary

Pac-West Telecom, Inc. ("Pac-West") files this Petition for Clarification ("Petition") of the Federal Communications Commission's ("Commission") *Waiver Order*. As set out herein, there are numerous issues that require further evaluation and clarification from the Commission. In granting a non-carrier entity the ability to both obtain telephone numbers and interconnect with telecommunications carriers, the Commission has inadvertently introduced uncertainty into many other matters of importance to traditional telecommunications carriers and to providers of Voice over Internet Protocol services.

The *Waiver Order* may cause legal uncertainty with regard to "transit traffic" provided for in interconnection agreements between Pac-West and SBC Communications Inc. ("SBC"). As detailed in this Petition, the *Waiver Order* may allow SBC to structure its traffic such that it becomes subject to the transit traffic provisions of the interconnection agreement. If this does in fact occur, it may allow SBC to argue that Pac-West cannot collect any form of intercarrier compensation from SBC for such traffic, nor would Pac-West be able to recover such charges from SBC Internet Services, Inc. ("SBC-IS").

The *Waiver Order* also causes significant confusion as to the number portability obligations of non-carrier entities and the number portability process. Regarding number portability, the *Waiver Order* calls into question non-carrier entities' status as users of telecommunications services. Non-carrier entities have been historically able to purchase telecommunications services as an end user of such services. If such entities are also considered users of telecommunications services for purposes of the Commission's number portability rules, their obligation to port telephone numbers is unclear. Concerning the actual process of porting telephone numbers, if non-carrier entities as a result of the *Waiver Order* are empowered to submit Local Service Requests on their own behalf, the Commission has left completely unaddressed the applicability of state and federal unauthorized carrier change regulations.

In granting non-carrier entities the ability to interconnect with telecommunications carriers, the Commission has also caused confusion as to the appropriate interpretation of section 251 of the 1996 Telecommunications Act. Pursuant to this section, all local exchange carriers are required to interconnect. What is left unclear by the *Waiver Order* is whether SBC-IS is bound by section 251. Further, section 251(c) imposes additional obligations on incumbent local exchange carriers that SBC can avoid as a result of the *Waiver Order*.

Perhaps most troubling by the *Waiver Order* is the lack of any protections against a "price squeeze." By virtue of the *Waiver Order*, SBC-IS may obtain telephone numbers if SBC-IS provides evidence that SBC-IS has ordered an interconnection arrangement pursuant to a tariff that is generally available to other providers of IP-enabled services. While this may provide some level of protection concerning the terms and conditions that SBC has made available to SBC-IS, it does not address the more important issue of the rates charged for such services.

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I. INTRODUCTION

Pac-West Telecomm, Inc. ("Pac-West") hereby petitions for clarification of the Commission's decision to grant SBC Internet Services, Inc. ("SBC-IS") a waiver of Section 52.15(g)(2)(i) of the Commission's rules in the above-referenced proceeding.[1] The *Waiver Order* allows SBC-IS to directly access telephone numbers from the North American Numbering Plan Administrator ("NANPA") and the Pooling Administrator ("PA") as well as to enter into direct interconnection arrangements with licensed telecommunications carriers. SBC-IS is a non-regulated entity and does not possess any federal or state licenses to offer telecommunications services.[2] By granting SBC-IS' petition, the Commission allowed a non-carrier entity access to telephone numbers, granted it the ability to directly interconnect with

[1] *In the Matter of Administration of the North American Numbering Plan*, Order, CC Docket 99-200, FCC 05-20 (released Feb. 1, 2005) ("*Waiver Order*").

[2] *In the Matter of SBC IP Communications, Inc. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, CC Docket 99-200 (filed July 7, 2004) ("*SBC-IS Petition*").

licensed telecommunications carriers, and indicated that it would provide similar relief to other non-carrier entities.[3]

Pac-West submits that the *Waiver Order* has unintended consequences that require clarification. The *Waiver Order* causes substantial confusion as to the intercarrier compensation arrangements between traditional providers of telecommunications services and a non-carrier entity, such as SBC-IS. Further, number portability obligations and the applicability of state and federal unauthorized carrier change rules are difficult to harmonize in light of the *Waiver Order* without clarification from the Commission. Interconnection obligations under section 251 of the 1996 Telecommunications Act are also unclear as a result of the *Waiver Order*. Finally, the Commission failed to safeguard against the potential for a "price squeeze." For these reasons, the Commission must clarify the *Waiver Order*.

II. THE *WAIVER ORDER* CAUSES UNCERTAINTY AS TO INTERCARRIER PAYMENT ARRANGEMENTS BETWEEN LICENSED TELECOMMUNICATIONS CARRIERS

The Commission's *Waiver Order* causes confusion concerning intercarrier compensation arrangements between licensed telecommunications carriers. As the Commission is aware, telecommunications carriers pay either reciprocal compensation or access charges to compensate such entities for the origination or termination of traffic over each others network. In granting SBC-IS' petition, the Commission failed to take into consideration the impact the *Waiver Order* would have on these intercarrier compensation arrangements.

According to the Commission's rules, only carriers are liable for access charges and reciprocal compensation.[4] Pac-West's interconnection agreement with SBC Communications

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[3] *See Waiver Order*, at ¶ 11.

[4] *See* respectively, 47 C.F.R. § 69.1 *et. seq.* and 47 C.F.R.§ 51.701 *et. seq.*

Inc. ("SBC") – the incumbent local exchange carrier ("LEC") affiliate of SBC-IS – does not allow Pac-West to bill SBC for traffic passed to Pac-West's network when SBC acts as a "transit carrier." SBC is considered a "transit carrier" under the interconnection agreement for traffic that merely traverses SBC's network that a SBC customer did not originate.

By granting SBC-IS' petition and allowing SBC-IS to obtain telephone numbers directly so that SBC-IS can interconnect "with the PSTN on a trunk-side basis, at centralized switching locations, e.g., a tandem switch [,]"[5] the Commission may have unwittingly allowed SBC-IS' affiliated incumbent LEC, SBC, to structure its traffic exchange arrangements with Pac-West in a manner that could greatly disadvantage Pac-West. Specifically, if a customer of SBC-IS uses a Voice over Internet Protocol ("VoIP") service to originate a voice communication to a Pac-West customer and SBC carries the call for its affiliate to Pac-West's network, this traffic may constitute "transit traffic" under the Pac-West and SBC interconnection agreement. Pac-West may be unable to collect any form of intercarrier compensation from SBC pursuant to the terms of the contract governing "transit traffic." Further, Pac-West may not have the ability to collect either reciprocal compensation or access charges from SBC-IS since such charges can only be assessed on other telecommunications carriers, which SBC-IS is not, despite SBC-IS' ability to both directly obtain telephone numbers and to interconnect with telecommunications carriers. Accordingly, the Commission must clarify that carriers like Pac-West are entitled to compensation for the use of their network even when such traffic is delivered to Pac-West by a non-carrier that has been granted a waiver allowing it to obtain numbers directly, or from any carrier affiliated with such an entity, such as SBC. To find otherwise would encourage SBC to

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[5] *SBC-IS Petition*, at 5.

transition their customers to SBC-IS in order to take advantage of the regulatory arbitrage opportunity unknowingly created by the Commission in the *Waiver Order*.

III. THE *WAIVER ORDER* LEAVES MANY IMPORTANT QUESTIONS UNADDRESSED RELATING TO NUMBER PORTABILITY

The *Waiver Order* also leaves many important questions unaddressed. For example, the obligations and applicability of the Commission's number portability rules are entirely unclear as a result of granting the *SBC-IS Petition*. The Commission's rules provide, in relevant part, that it is the ability of users of telecommunications services to port telephone numbers.[6] Under the rules prior to the grant of the *Waiver Petition*, the user of a telecommunications service could easily be determined – the first non-carrier entity to receive telephone numbering resources is the user of a telecommunications service. As a result of the *Waiver Order*, unregulated non-carrier entities are directly obtaining numbering resources from the NANPA and the PA. But many of these entities would be considered "end users" or users of telecommunications services pursuant to the Commission's existing precedent.[7] Thus, by issuing the *Waiver Order*, the Commission has cast confusion on the related issue of whether these entities will remain users of telecommunications services such that they have no legal obligation to port telephone numbers to other providers of communications services, including traditional providers of telecommunications services like Pac-West. The Commission must clarify whether the legal status of entities that are considered users of telecommunications service for some purposes are also considered users of telecommunications services for purposes of the number portability rules. Alternatively, the Commission must explain whether it meant that such entities are users

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[6] *See* 47 C.F.R. § 52.23. *See also*, 47 C.F.R. § 52.21(l), (p), (q).

[7] *See MTS and WATS Market Structure*, CC Docket 78-72 Phase 1, Memorandum Opinion and Order, 97 FCC 2d 683, 715, ¶ 83 (1983) ("*MTS/WATS Market Structure Order*").

of telecommunications services for some purposes but not others, like number portability regulations, such that these entities are compelled to comply with number portability requests that they receive from other similar entities and traditional carriers like Pac-West. The *Waiver Order* leaves these important issues unaddressed to the detriment of Pac-West, other telecommunications carriers, and VoIP providers.

The *Waiver Order* also raises considerable confusion concerning the process that will now govern number portability requests. A single cryptic statement in the *Waiver Order* provides "[SBC-IS] will be responsible for processing port requests directly rather than going through a LEC."[8] The surrounding paragraphs provide no additional clarity to this statement. It is entirely unclear as to what the Commission means by stating that SBC-IS will be "processing port requests directly." Does this mean that SBC-IS can send a Local Service Request ("LSR") directly to a telecommunications carrier like Pac-West and directly interact with the Number Portability Administration Center ("NPAC") and the porting out carrier, or; does this mean that when a customer wants to port their number to SBC-IS' service, the carrier servicing SBC-IS – most likely SBC –submits the LSR and SBC-IS processes the port request by directly interacting with the NPAC? If SBC-IS can engage in all of the activities required to port a telephone number from one carrier to another, do the timeframes and processes that govern wireline-to-wireline and wireline-to-wireless portability apply to SBC-IS and similarly situated entities when they request a port?[9] Further, if a customer of SBC-IS would like to port their telephone number to Pac-West, does Pac-West submit the LSR to SBC-IS or to the carrier serving SBC-IS? If it is

[8] *Waiver Order*, at ¶ 9.

[9] *See* respectively, 47 C.F.R. §§ 52.23, 52.26, 52.31.

the former, is SBC-IS bound by the same rules carriers are in terms of timeframes and process for porting telephone numbers?

The *Waiver Order* leaves unaddressed SBC-IS' obligations in relation to the unauthorized carrier change rules.[10] Specifically, if SBC-IS can directly process porting requests, and this means that SBC-IS can submit LSRs to other carriers, does this also mean that SBC-IS is bound by the Commission's unauthorized carrier change rules? Does SBC-IS have to obtain a letter of agency or comply with the other applicable safeguards that govern carrier change requests? What about state rules governing unauthorized carrier change requests? Do these rules apply to SBC-IS? If neither the federal unauthorized carrier change rules, nor the comparable state regulations apply to SBC-IS, but SBC-IS can submit a LSR directly to a carrier like Pac-West, does this mean that if SBC-IS wrongly obtained customer consent or simply made a mistake, Pac-West is liable for violating the Commission's and the relevant state's unauthorized carrier change rules since Pac-West is the only regulated entity from which the Commission and the state public utility commission can obtain relief? If both state and federal unauthorized carrier change rules apply, what means do the state public utilities commissions and the Commission have at their disposal to enforce these rules? Further, if states can regulate this aspect of SBC-IS' operations, how does the *Waiver Order* comport with the Commission's *Vonage Order* where the Commission found that a certain type of computer-to-phone Internet telephony is interstate in nature?[11] If the carrier change rules do not apply, why not?

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[10] *See* 47 C.F.R. § 64.1140.

[11] *In the Matter of Vonage Holdings Corporation*, 19 FCC Rcd 22404 (2004).

IV. THE *WAIVER ORDER* INTRODUCES SUBSTANTIAL UNCERTAINTY WITH REGARD TO THE APPLICABILITY OF SECTION 251 OF THE 1996 TELECOMMUNICATIONS ACT

The Commission has introduced a significant amount of confusion as to the applicability of Section 251 of the 1996 Telecommunications Act to SBC-IS. By providing SBC-IS with the right to interconnect directly with carriers, the Commission has extended the interconnection obligations imposed by section 251(a) of the 1996 Telecommunications Act to a non-carrier entity. Section 251(a)(1) of the 1996 Telecommunications Act requires *all* providers of local exchange service "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[12] Seemingly, the *Waiver Order* allows SBC-IS to engage in such interconnection arrangement with carriers but imposes no reciprocal duty on SBC-IS to allow carriers to interconnect directly with SBC-IS' facilities. The Commission must clarify the duties of carriers and entities receiving authority pursuant to the *Waiver Order* in regard to section 251(a) of the 1996 Telecommunications Act.

The *Waiver Order* allows SBC to escape its obligations under the 1996 Telecommunications Act and allows SBC, in conjunction with SBC-IS, to engage in unlawful discrimination. Section 251(c)(2) of the 1996 Telecommunications Act imposes on incumbent local exchange carriers, like SBC, three key and separate duties. First, incumbent LECs are required to interconnect with carriers at any technically feasible point for the transmission and routing of telephone exchange service and exchange access.[13] Second, section 251(c)(3) requires incumbent LECs to unbundle their network facilities and features.[14] Third, Section 251(c)(4)

[12] 47 U.S.C. § 251(a)(1).

[13] 47 U.S.C. § 251(c)(2).

[14] 47 U.S.C. § 251(c)(3).

directs an incumbent LEC to offer for resale, at a wholesale rate, any telecommunications service the incumbent LEC offers to end users at retail.[15] By transitioning customers to SBC-IS, SBC can avoid all the obligations imposed by section 251(c) of the 1996 Telecommunications Act because SBC-IS is not an incumbent LEC. This potential for harm was not addressed by the Commission in the *Waiver Order* and requires clarification.

V. THE *WAIVER ORDER* ALLOWS FOR SBC TO ENGAGE IN A "PRICE SQUEEZE"

The *Waiver Order* allows SBC-IS to obtain discriminatory access to the network *via* its incumbent LEC affiliate SBC. The Commission attempted to address this harm by imposing facilities-readiness requirements on SBC-IS. Specifically, the Commission will require SBC-IS to submit either an interconnection agreement approved by a state commission or evidence that SBC-IS has ordered an interconnection arrangement pursuant to a tariff that is generally available to other providers of IP-enabled services.[16] What the Commission failed to address is the ability of SBC and SBC-IS to engage in a "price squeeze" even if SBC-IS is able to demonstrate compliance with the facilities-readiness conditions set out in the *Waiver Order*.

A price squeeze exists when (1) a firm operates as a seller of both retail and wholesale offerings, (2) one or more companies relies on the firm's wholesale offerings to compete with the firm on the retail level, and (3) the difference between the retail prices for the service at issue and the firm's price for the wholesale input - if any - is too narrow to allow its retail competitors to cover their costs by providing service in the retail market.[17] The Commission's attempt to

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[15] 47 U.S.C. § 251(c)(4).

[16] *See Waiver Order*, at ¶ 10.

[17] *See, e.g., Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 18 (1st Cir. 1990); *Cities of Anaheim, Riverside, Banning, Colton, and Azusa, California, et al., v. Fed. Energy Regulatory Comm'n*, 941 F.2d 1234, 1237 (D.C. Cir. 1991); *see also Sprint*

preclude harm to other carriers and VoIP providers that would desire to compete with SBC-IS does not protect against the potential for a price squeeze by requiring SBC and SBC-IS to *either* enter into an interconnection agreement, *or* require SBC-IS to file evidence that SBC-IS has ordered an interconnection service pursuant to a generally available tariff. The mere existence of a tariff or interconnection agreement does not, in and of itself, protect competitors from a price squeeze when the rates for those services are controlled by SBC-IS' incumbent LEC affiliate, SBC. While the ability of other VoIP providers and carriers to obtain similar terms and conditions is addressed by the *Waiver Order*, the more important potential for harm lies with the possibility of SBC and SBC-IS to engage in a price squeeze through the rates charged for such services.

As the Commission recognized in the *Triennial Review Remand Order*,[18] incumbents, like SBC-IS' incumbent LEC affiliate SBC, have the power "to utilize vertical price squeezes against competitors relying on the incumbent for tariffed wholesale inputs."[19] Indeed, the United States Court of Appeals for the District of Columbia affirmed that incumbent LECs have "the incentive to set the tariff price as high as possible. . . ."[20] The *Waiver Order* fails to protect carriers and VoIP providers from anticompetitive behavior because it merely requires SBC to offer IP services on tariffed basis that is generally available to other providers of IP-enabled

Communications Co. L.P. v. F.C.C., 274 F.3d 549, 553-57 (D.C. Cir. 2001) (requiring the FCC to consider the possibility that incumbent LECs might effect a price squeeze involving UNEs, the prices of which are regulated, in part because TELRIC rates, conceivably, are set too high) (citing *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1976)).

[18] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (released February 4, 2005) ("*Triennial Review Remand Order*").

[19] *Trienneial Review Remand Order*, at ¶ 47.

[20] *United States Telecom Association v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*").

services.[21] Accordingly, the Commission should clarify that while the availability of a tariff or interconnection agreement is acceptable as evidence of facilities readiness for unaffiliated providers of VoIP services, such arrangements do not safeguard the potential for a price squeeze when SBC and SBC-IS are providing VoIP services and additional obligations should be imposed on SBC when dealing with its affiliate.

[21] *See Waiver Order*, at ¶10.

VI. CONCLUSION

Pac-West Telecomm, Inc. requests that the Commission clarify its decision to grant a waiver to SBC-IS of Section 52.15(g)(2)(i) of the Commission's rules. Failure to do so may introduce legal uncertainties into the intercarrier compensation arrangements between carriers and companies receiving waivers. The applicability of the Commission's number portability rules and the unauthorized carrier change statutes and rules on the federal and state level are also unclear as a result of the *Waiver Order* and require clarification as a result. The interconnection obligations set out in section 251 of the 1996 Telecommunications Act also require clarification because of the *Waiver Order*. Finally, the Commission must adopt additional protection so as to restrain the ability of SBC to engage in a price squeeze when it enters into arrangements with its affiliate SBC-IS.

Respectfully submitted,

/s/

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Dated: March 3, 2005

CERTIFICATE OF SERVICE

This is to certify that I have duly served the attached Petition for Clarification of the Commission's *Waiver Order* upon all parties herein by depositing copies of same in the United States mail, first class postage prepaid, or as otherwise indicated this 3rd day of March, 2005, addressed as follows:

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